

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1486

To be argued by
BARRY BASSIS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
: UNITED STATES OF AMERICA,
: Plaintiff-Appellee,
: -against-
: VINICIO PARADIS,
: Defendant-Appellant.
: -----x

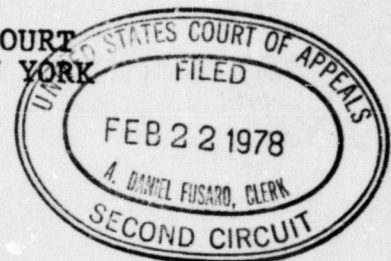
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Docket No. 77-1486

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether this Court should examine the sealed exhibit of
the district court and should permit appellate counsel to
examine the exhibit.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable John M. Cannella) rendered December 7, 1977, after a jury trial, convicting appellant of possession (18 U.S.C. §472) and sale (18 U.S.C. §§2 and 472) of counterfeit money (Counts IV and V). The district court suspended sentence on both counts and placed appellant on probation for two years.

By order of this Court dated December 13, 1977, The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

Appellant Vinicio Paradis and Jacinto Vasquez were indicted (77 Cr. 561) for the crimes of conspiracy to sell, as well as the substantive count of selling, 2,800 counterfeit \$5 Federal Reserve notes; appellant alone was charged with possession of 43 counterfeit \$5 bills. Vasquez pleaded guilty before commencement of trial.*

*Two counts relating to Vasquez alone were redacted from the indictment at trial.

A. The Government's Case

The prosecution's case rested on the testimony of four Secret Service agents: Marino Rodillo and Raphael Calzada (who acted in an undercover capacity) and Donald L'Hullier and Charles DeVita (who surveilled the attempted sale and arrest). On May 31 and June 1, 1977, the undercover agents negotiated with Vasquez for the purchase of a quantity of counterfeit money from him at 27½ per cent of the face value (19-20, 23-26, 38-40).^{*} The sale was to take place at 1:00 p.m. on June 2 at Korvette's parking lot on White Plains Road (27, 41-42). When the agents arrived at the scene, Vasquez and appellant were working on the motor of Vasquez' blue Toyota. Appellant was seen bringing some tools from his car, which was parked 75 feet away (44, 56-57, 62-63). Vasquez introduced appellant, whom none of the agents had ever seen before (30-31, 42, 60, 62-63), as his uncle (43). Appellant remained at the Toyota with one of the agents while Vasquez showed the other agent \$14,000 in counterfeit \$5 bills, which was cached in appellant's car (31-33, 43-45). Appellant allegedly remarked, "Look, those guys are there dealing with that stuff with the door opened" (45, 80-81). As the agents were about to pay for the counterfeit currency, they gave the prearranged signal and appellant and Vasquez were arrested (47).

^{*}Numerical references are to pages of the trial transcript dated November 1-4, 1977. The transcripts of two of Vasquez' telephone conversations were read to the jury (55).

B. The Defense

Appellant Vinicio Paradis, a gypsy cab driver,* testified in his own defense. During May of 1977, he negotiated the sale of his cab to Vasquez, a recent and casual acquaintance (84-93). Vasquez postponed the deal until June 2, when he promised to obtain the \$500 after 1:00 p.m. That morning, he gave appellant \$215 in \$5 bills as a show of good faith. At Vasquez' request, appellant followed him to the Korvette's parking lot, not knowing that the bag Vasquez asked him to bring in his car contained counterfeit money (96-100, 103). Appellant told the agent that he was surprised Vasquez was conducting a "big money deal" with the door open, not that Vasquez was "dealing" in "stuff" (111).

After his arrest, appellant learned from the agent the nature of Vasquez' transaction. Because appellant did not want to get Vasquez into additional trouble for passing \$215 in counterfeit money to him, he told the agents that he knew the currency was counterfeit. When he later realized that he was not being held as a witness but as a suspect, appellant admitted to the Assistant United States Attorney that he had no idea that Vasquez was dealing in counterfeit money until after the arrest (107-109, 114, 138-140).

*Appellant is married and the father of three children (84). During 1975, when his license was suspended, he used a copy of his friend's driver's license so that he could support his family (130-133, 140-142).

C. Verdict and Sentence

After more than a day of deliberations, the jury acquitted appellant of conspiring with Vasquez to sell the counterfeit money, but found him guilty of aiding and abetting the sale as well as possession of \$215 in counterfeit money.

Imposition of sentence was suspended and appellant was placed on probation for two years.

ARGUMENT

THIS COURT SHOULD DETERMINE WHETHER
THE MATERIALS EXAMINED IN CAMERA BY
THE DISTRICT COURT SHOULD HAVE BEEN
PRODUCED AS JENCKS ACT MATERIAL.

At trial, the Government submitted possible Jencks Act material to Judge Cannella. After an ex parte conference, the court denied the defense access to this material, sealing for appellate review the exhibit as well as the minutes of the conference (3, 9-10).

The procedure followed by the court below is in accord with the rules outlined in 18 U.S.C. §3500(c) for review of a district court determination under that section that materials need not be disclosed:

If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the Court for the purpose of determining the correctness of the ruling of the trial judge.

While the district court's ruling concerning producibility is entitled to some weight (see Campbell v. United States, 373 U.S. 487, 493-497 (1963); United States v. Cruz, 478 F.2d 408, 412-413 (5th Cir. 1973)), as §3500 clearly contemplates, provision is made for appellate review of such decisions. Campbell v. United States, supra.

Such review is necessary, given the crucial importance of §3500 material to the conduct of an adequate defense. As the Supreme Court, in the case whose ultimate result was the promulgation of 18 U.S.C. §3500, explained:

Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his remarks is not the only test of inconsistency. The omission from the report of facts related at trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

Jencks v. United States, 353 U.S. 657, 667 (1957).

Of course, at the present state of the record in this case, appellate counsel is completely unable to make any judgment concerning the nature or importance of the withheld materials. Accordingly, we submit along with this brief a motion to permit appellate counsel to examine the sealed materials and to file a supplemental, sealed brief to this Court explaining appellant's position on the producibility and importance of the materials.

In the alternative, we urge that this Court examine the materials and determine the propriety of the district court's conclusion. 18 U.S.C. §3500(c).*

CONCLUSION

For the foregoing reasons, this Court should examine the sealed exhibit to determine the correctness of the district court's determination and, if appropriate, to order a new trial.

Respectfully submitted,

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*If our motion to examine the sealed materials is granted and if the materials raise no non-frivolous issue, we shall file the appropriate motion and brief to be relieved as counsel pursuant to Anders v. California, 386 U.S. 738 (1966).

CERTIFICATE OF SERVICE

Feb. 22, 1978

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Barry Bassis

